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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 304

MARTIN BROTHERS BOX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 565–574) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 47–81) are reported in 35 N. L. R. B. 217.

JURISDICTION

The decree of the court below (R. 575–577) was entered on July 14, 1942. A petition for rehearing filed by petitioner was denied on July 9, 1942 (R. 575). The petition for a writ of certiorari was

filed on August 14, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the Board's findings that petitioner engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act are supported by substantial evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 15.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 47–81). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

After it had enlisted a majority of petitioner's employees as members,[2] the Aurora Corrugated Box Workers' Union No. 435, affiliated with the

[1] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

[2] Contrary to the apparent implication of the petition for certiorari (pp. 15–16), the Board did not find that petitioner committed any unfair labor practice by posting a certain letter (R. 52) during the organizational campaign.

A. F. of L. (herein called the Union), entered into negotiations with petitioner in the fall of 1938 (R. 52–53; R. 87–88). The Union bargaining committee, headed by Union President McDaniel, repeatedly rejected a contract proposed by petitioner which, among other things, provided for continuance of the existing wage scale (R. 53–54; R. 88–91, 150–151, 355–357, 402). Thereupon petitioner's president, Martin, turning from negotiating with the committee, convened a mass meeting of all employees at which he criticized the committee and told the employees that McDaniel was "a damn poor president and they ought to elect a new one," and urged them to accept petitioner's proposed contract; the employees accepted the proposed contract (R. 54–55, 56; R. 92–93, 127–128, 168–169, 174–175, 356–358, 402–403, 457–460). The Board found that petitioner, disregarding its duty to negotiate only with the representatives chosen by the employees, had "thrust aside the orderly process of bargaining * * * and sought to deal with the employees as though the Union did not exist"; that Martin "further undercut" the Union by urging displacement of President McDaniel; and that this conduct interfered with, restrained, and coerced employee self-organization contrary to Sections 7 and 8 (1) of the Act (R. 56–57, 79).

For almost nine months after the execution of the contract, McDaniel, as Union president and chairman of the grievance committee, presented grievances to petitioner which were amicably set-

tled (R. 55, 57; R. 84–85, 130–136). In August 1939 a grievance involving the die makers was rejected by President Martin after negotiations with McDaniel and the Union grievance committee (R. 57–58; R. 94–96, 292, 358–359, 405–409). Thereupon McDaniel and the grievance committee advised petitioner's plant superintendent of their intention to invoke the arbitration clause of the contract (R. 58; R. 96). McDaniel accordingly wrote to the Union's International representative, authorized him to proceed with arbitration, and concluded his letter with the statement that "the entire membership say that it is time to do to Martin what England and France are going to do to Hitler, only with more speed" (R. 58–59; R. 96, 139). A copy of the letter, in accordance with the usual custom in grievance matters, was also given to petitioner (R. 59; R. 96–97, 100, 400). Martin immediately called a mass meeting of the employees at which he first castigated and then discharged McDaniel, and threatened to lock out the employees unless they promptly removed McDaniel as Union president (R. 59–61, 62; R. 100–103, 170, 202–203, 363, 398). At the hearing Martin asserted that he had discharged McDaniel because Martin interpreted the letter as a threat on his life (R. 59–61; R. 363, 398). The Board rejected the explanation; it found that the letter was, as McDaniel testified (R. 61; R. 98–100), merely a threat to call a strike, that Martin could not have believed

otherwise,[3] and that McDaniel was in fact discharged because he insisted upon pressing the die makers' grievance instead of accepting Martin's rejection (R. 62–63). The Board accordingly found that petitioner had "discriminated in regard to McDaniel's hire and tenure of employment, and discouraged membership in the Union," in violation of Section 8 (3) and (1) of the Act (R. 63, 78–79). It further found that Martin's actions at the mass meeting, including the threat of a lock-out unless the employees replaced McDaniel, constituted additional interference in violation of Section 8 (1) of the Act (R. 63, 79).

On August 31, the day after McDaniel's discharge, Assistant Superintendent Dodge advised Charles Huff, a boiler fireman and charter member of the Union, that since he was "an awfully good friend of McDaniel's," he had better look for another job (R. 63; R. 158, 156, 167, 171).

[3] The Board pointed out (R. 62) that McDaniel had similarly resorted to a circumlocution when threatening a strike in an earlier letter to petitioner (R. 53 fn.); that there was nothing in McDaniel's 7-year employment record with petitioner indicating that he was a man of violent disposition (R. 83, 99–100, 362, 401, 415); that McDaniel had amicably settled grievances with Martin for the preceding nine months (*supra*, pp. 3–4); that McDaniel and Martin frequently addressed each other by their first names (R. 61, 401); that when he discharged McDaniel, Martin shook hands with him and wished him well (R. 102, 148, 364, 400–401); and, finally, that Martin testified at the hearing that he discharged McDaniel because McDaniel was the cause of friction between petitioner and the employees (R. 363).

When Huff thereupon sought a recommendation, he was called into the office of Superintendent Stark who asked how Huff felt about McDaniel's discharge and what testimony he was going to give in McDaniel's unemployment compensation hearing (R. 63–64; R. 159–162). Huff replied that he intended to tell the truth and that he believed McDaniel was merely doing his duty as Union president in pressing the die makers' grievance; Stark replied that he was laying Huff off pursuant to "Fred Martin's orders" (R. 64; R. 161–162). Huff was thereafter refused reinstatement (R. 64–65; R. 164). Upon the foregoing evidence, and in the light of petitioner's self-contradictory explanations for the discharge (R. 65–66; R. 9, 434–435, Bd. Exh. 21), the Board found that Huff was discharged because he was a Union member identified by petitioner with McDaniel toward whom he exhibited a sympathetic attitude (R. 66). The Board concluded that petitioner had "discriminated in regard to Huff's hire and tenure of employment, discouraging membership in the Union," thereby violating Section 8 (3) and (1) of the Act (R. 66, 78–79).

The contract concluded in 1938 (*supra*, p. 3) provided that it would terminate on October 15, 1939, upon 30 days' written notice by either party of a desire to enter into a new agreement (R. 68; R. 457). From early in September 1939, to late in November, the Union repeatedly sought to arrange a meeting with President Martin to nego-

tiate a new contract, but Martin neither met with the Union nor appointed a negotiator with power to bind petitioner (R. 68–70, 73–75; R. 209–217, 247–257, 274–275, 293, 403, 422–523, 460–462, 490–491). Martin was advised several times that the employees were contemplating a strike because of his dilatory tactics (R. 69–70; R. 214–217, 462, 490). During the last week in November, Martin finally agreed to meet with the Union representatives on December 5; the employees, however, went on strike December 1 (R. 70; R. 189, 220–226, 268, 317–319, 369–370). On the same day Martin, in a letter to the Union representatives, suggested that the December 5 meeting be held at a designated hotel in Cincinnati (R. 71; R. 465–466, 226–229, 370–372, 416). When they arrived on the appointed day, the Union representatives found that Martin was not there (R. 71, 75; R. 297, 371, 416).

On December 12 Martin met for the first time with the Union representatives and arrived at an accord, subject to the approval of the Union membership (R. 71–72; R. 298–299, 321, 373–374). When the membership rejected the proposed agreement (*ibid.*), Martin on December 14 wrote the Union that he was preparing a new proposed contract, but emphasized that "That is no indication that we will sign what we ourselves consider a fair and equitable agreement. Under the Act we are not compelled to do so" (R. 72; R. 472–474). The next day Martin sent another letter stating "We have definitely decided not to sign an agreement,

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and further will not draft one" (R. 72; R. 474–475). On December 28, at another meeting between the Union representatives and Martin, changes in the proposed contract were agreed upon and Martin consented to sign it upon acceptance by the employees (R. 72; R. 299–300, 304, 276–279, 323–324, 377, 390–392, 394–395, 436, 450, 475–480, 503). The following day, when the Union voted to postpone ratification until further efforts had been made to secure the reinstatement of Huff (R. 73; R. 329–330, 341), Martin took the position that petitioner would never enter into a binding agreement with the Union because the latter had "broken faith" (R. 73; R. 333–334, 395–397). On January 2, 1940, the Union voted unconditionally to accept the agreement reached December 28, and the following day called off the strike (R. 73; R. 241, 276, 301–304, 333, 381–382, 396–397, 444). Admitting that the parties were in full agreement by January 3 when the employees returned to work, Martin nevertheless refused to sign the December 28 agreement or any other written contract although again requested to do so by the Union at various times between January 3 and May 1940 (R. 73; R. 333–334, 385–386, 396–397, 449–450, 480–482, 483, 485–489, 306, 308–311, 339, 342–343, 446, 448). Petitioner's position was still unchanged at the time of the Board hearing in October 1940 (R. 73; R. 397, 448–449).

The Board found that "by Martin's failure within a reasonable time either to meet and bargain

with the Union himself or to appoint a fully authorized agent to do so; by his failure to keep the appointment scheduled for December 5, 1939, in Cincinnati; by his statement on December 14 and 15, 1939, that he would not sign a written agreement; and by his refusal after January 2, 1940, to enter into and sign any agreement with the Union, the [petitioner] has failed and refused, since October 15, 1939, to bargain collectively with the Union," thereby violating Section 8 (1) and (5) of the Act (R. 76, 79).

The Board's order required petitioner to cease and desist from its unfair labor practices; upon request to bargain collectively with the Union and to embody any agreement reached in a signed contract; to reinstate and make whole the two employees discriminatorily discharged; and to post appropriate notices (R. 79–81).

Thereafter the Board filed in the court below a petition for enforcement of its order (R. 561–565). On June 23, 1942, the court handed down its opinion enforcing the Board's order in full (R. 565–574). A petition for rehearing was denied on July 9, 1942 (R. 575), and on July 14, 1942, the court entered its enforcement decree (R. 575–577).

ARGUMENT

1. Petitioner contends in general (Pet. 14–23, 24–30) that the Board's findings of unfair labor practices are not supported by substantial evidence. It seeks to support this contention by its

Statement and Argument (Pet. 8–13, 14–23, 24–30) which omit most of the important evidentiary facts found by the Board upon which the Board based its ultimate findings of unfair labor practices. Upon the full facts found by the Board, set forth in our Statement and supported by the substantial evidence we have cited (*supra*, pp. 2–9), the Board's findings of unfair labor practices were clearly proper. The court below, after extended review and analysis of the evidence, correctly held that these findings had substantial support. No question of general importance is presented by petitioner's general contention that the Board's findings are not supported by substantial evidence and further review by this Court is not warranted.

2. Petitioner also attacks (Pet. 23–24, 31) the Board's conclusion that the discharges of McDaniel and Huff violated Section 8 (3); this contention is based on an asserted absence of evidence to support the Board's finding that the discharges discouraged membership in the Union.[4] Petitioner also urges that the affirmance of the Board's order in respect of McDaniel and Huff is in conflict with *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586 (C. C. A. 2). The contention is without merit.

[4] Section 8 (3) provides that it shall be an unfair labor practice for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

Even as a primary finding of fact, the Board's finding that the discharge of Huff and McDaniel discouraged membership in the Union is independently supported by the evidence that McDaniel resigned from the presidency of the Union and became inactive shortly after he and Huff were discharged (R. 106–109), and by the evidence that "the grievance committee after Mr. McDaniel's discharge didn't function. They were afraid to, because of McDaniel's discharge" (R. 273). But even apart from this independent supporting evidence, the finding that the discharges discouraged Union membership is an inference which the Board reasonably drew from its plainly supported findings (*supra,* pp. 3–6) that the discharges were motivated by the Union membership and activities of McDaniel and Huff and, therefore, were discriminatory. It has been the Board's consistent view that a discharge because of union membership and activity necessarily discourages union membership, at least that of the discharged employees, and that therefore such discharge is *ipso facto* a violation of Section 8 (3).

This view has been implicitly upheld by this Court in the many Section 8 (3) cases upon which it has passed, for it has often upheld Board findings of violations of the Section simply upon supported findings of discrimination and without other additional evidence of discouragement of the sort which petitioner here asserts is necessary.

E. g., *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 129; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 255; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177;[5] *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 589, 598, 600, 603.[6] See also S. Rep. No. 573, 74th Cong., 1st Sess., p. 11; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 19.

Whatever doubt the *Air Associates* case may be thought to cast upon the broad proposition that the Board may *in every case* reasonably infer from a supported finding of discriminatory discharge the

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[5] In the *Phelps Dodge* case, the Court declared that "the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8 (3)" (at p. 187); that "discrimination in hiring [is] an 'unfair labor practice'" (at p. 181); that "it is no longer disputed that workers cannot be dismissed from employment because of their union affiliations" (at p. 183); that "in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act" (at p. 185). The Court recognized that antiunion discrimination inevitably discourages union membership, for it stated (at p. 185): "The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization." And further (at p. 186), "We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper."

[6] In the *Link-Belt* case, the Court expressly recognized that the discriminatory discharge of a leader in Amalgamated "would tend to have as potent an effect as direct statements to the employees that they could not afford to risk selection of Amalgamated" (311 U. S., at 598).

further finding that such discharge discouraged union membership, the doubt is misplaced here even assuming, contrary to fact, that such further finding is not here supported independently. For the portion of the opinion in the *Air Associates* case on which petitioner relies (Pet. 19–20) concerned two employees who were discharged under unique circumstances which, in the court's view, precluded an inference of discouraging effect. That the decision is limited to its particular facts appears from the court's action in upholding, in the same case, Board findings of violation of Section 8 (3) in respect of three other employees discharged for union activities, despite the absence of independent evidence of discouraging effect (see 20 N. L. R. B., at 380, 384, 388). And, indeed, the Second Circuit in a subsequent decision expressly pointed out the limits of the *Air Associates* case and upheld Board findings of violation predicated on conventional discriminatory discharges like those in the instant case. *National Labor Relations Board* v. *Cities Service Oil Co.*, decided July 2, 1942 (C. C. A. 2).[7] While the Board disagrees with

[7] The court in the *Cities Service* case explained that the *Air Associates* opinion should be "very narrowly limited" to its facts, which were that the employer discharged two employees whom, so far as the record showed, it thought to be nonunion men, telling them that it was obliged to do so in order to make room for two union officials who had been previously discharged; upon such facts, the court explained in the *Cities Service* case, it could discover no "rational basis for a conclusion that the discharge violated the Act; for an

the court's conclusion in the *Air Associates* case, the express limitation of that case to its facts precludes a claim of conflict with the instant case.[8]

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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SEPTEMBER 1942.

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employer to tell men whom, so far as the record showed, he thought to be nonunion men that they must be dismissed to make room for union men, would not necessarily tend to discourage union membership."

[8] In *Stonewall Cotton Mills, Inc.* v. *National Labor Relations Board*, decided June 3, 1942 (not cited by petitioner), the Circuit Court of Appeals for the Fifth Circuit at first upheld the view for which petitioner here contends, but on the Board's petition for rehearing, the court reversed, or at least seriously modified, its position and held that the Board properly inferred that a discriminatory discharge had the effect of discouraging union membership despite the absence of any "positive evidence" that it had such effect (decision on rehearing, July 6, 1942).